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10 IN THE UNITED STATES DISTRICT COURT  
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
12  
13 SAN FRANCISCO DIVISION

14 UNITED STATES OF AMERICA, ) No. CR 10-0859 RS  
15 Plaintiff, ) MOTION IN LIMINE TO EXCLUDE  
16 v. ) PRIOR CONSISTENT STATEMENTS BY  
17 GARY HARDEMAN, ) ALLEGED VICTIM  
18 Defendant. ) Honorable Richard Seeborg  
19 ) July 10, 2013  
20 ) 2:00 p.m.  
21 \_\_\_\_\_)

22 **INTRODUCTION**

23 Defendant Gary Hardeman will in all likelihood be impeaching the alleged victim in this  
24 case with prior statements that are inconsistent with her expected testimony at trial. The natural  
25 inclination may be to permit the government to rehabilitate her with prior consistent statements.  
26 However, the evidentiary rules regarding prior consistent statements and prior inconsistent  
27 statements are not mirror images of one another. On the contrary, the requirements for admitting  
28 a prior consistent statement are much more stringent than those for admitting a prior inconsistent  
statement. Accordingly, the Court should exclude such prior consistent statements that do not meet  
the requirements under the applicable rule.

29 **ARGUMENT**

30 A witness who testifies at trial may be impeached with a prior inconsistent statement or  
31 omission. *See, e.g., United States v. Adamson*, 291 F.3d 606, 612 (9th Cir. 2002). There are two  
32 federal evidentiary rules addressing such prior inconsistent statements. Rule 801(d)(1)(A)

33 LIM. EXCLUDE CONSISTENT STATEMENTS

1 defines as non-hearsay a witness's prior statement that is "inconsistent with the declarant's  
 2 testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a  
 3 deposition." Fed. R. Evid. 801(d)(1)(A). Rule 613 more broadly addresses the admission of  
 4 prior inconsistent statements not meeting the requirements of Rule 801(d)(1)(A), including the  
 5 admission of extrinsic evidence of the prior statement. *See* Fed. R. 613. Rule 613 authorizes the  
 6 introduction of prior inconsistent statements that are not admissible for the truth of the matter  
 7 asserted, but rather to "raise the suggestion that if a witness makes inconsistent statements, then  
 8 his entire testimony may not be credible." *Adamson*, 291 F.3d at 612.

9 Prior *consistent* statements, by contrast, are only admissible under the provisions of Rule  
 10 801(d)(1)(B), which defines as non-hearsay a witness's prior statement that "is consistent with  
 11 the declarant's testimony and is offered to rebut an express or implied charge that the declarant  
 12 recently fabricated it or acted from a recent improper influence or motive in so testifying." Fed.  
 13 R. Evid. 801(d)(1)(B). Focusing on the word "recent," the Supreme Court has held that, even  
 14 where there is an express or implied charge that the declarant did fabricate the testimony or act  
 15 from an improper motive or influence, a prior consistent statement is not admissible at trial under  
 16 Rule 801(d)(1)(B) unless the prior consistent statement was "made before the alleged  
 17 fabrication, influence, or motive came into being." *Tome v. United States*, 513 U.S. 150, 156  
 18 (1995); *see also id.* (applying to Rule 801(d)(1)(B) the common law temporal requirement that  
 19 the "prior consistent statement has not relevancy to refute the charge unless the consistent  
 20 statement was made before the source of the bias, interest, influence or incapacity originated")  
 21 (citation and internal quotation marks omitted).<sup>1</sup>

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24     <sup>1</sup> The Supreme Court in *Tome* reversed the defendant's conviction for aggravated sexual  
 25 abuse of his daughter on the grounds that the trial court improperly admitted prior consistent  
 26 statements by the alleged victim in that case. *See id.* at 167. In doing so, the *Tome* Court  
 27 specifically cautioned: "Courts must be sensitive to the difficulties attendant upon the  
 28 prosecution of alleged child abusers. In almost all cases a youth is the prosecution's only  
 eyewitness. But this Court cannot alter evidentiary rules merely because litigants might prefer  
 different rules in a particular class of cases." *Id.* at 166 (citation and internal quotation marks  
 omitted).

1 Here, the defense will be charging that the alleged victim’s motive to fabricate  
2 commenced with her first interview at the U.S. Embassy in Mexico City on December 17, 2007,  
3 in which she was suggestively asked the leading question of whether Mr. Hardeman had ever  
4 tried to have sex with her during the time she stayed with him in his hotel room, and she said that  
5 he did try but that no actual sexual contact ever occurred. *See* Declaration of Daniel P. Blank  
6 (filed concurrently with this memorandum) [hereinafter “Blank Decl.”] ¶ 2. The alleged victim  
7 stuck to this story, with some variations, until August 2010 when she was prepared by the case  
8 agent to testify before the Grand Jury and for the first time claimed that Mr. Hardeman had  
9 forcibly raped her. *See id.* Thus, under the terms of Rule 801(d)(1)(B) as interpreted by *Tome*,  
10 any consistent statements from August 2010 would not be admissible at trial, notwithstanding  
11 the impeachment with prior inconsistent statements, because they occurred after the “alleged  
12 fabrication, influence, or motive came into being.”

## CONCLUSION

14 For the aforementioned reasons, the Court should under Rule 801(d)(1)(B) all exclude  
15 prior consistent statements that post-date the commencement of the charged fabrication.

16 | Dated: June 26, 2013

Respectfully submitted,

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/s/

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